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Where do we go from here?
Fundamental Rights in the Post-Maastricht legal Order

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Introduction

This essay considers the protection of civil liberties in the context of the European Community/Union. One possible way forward would be for the EC to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). I therefore examine the problems, real and perceived, that accession would hold for the EC. There are institutional, political and jurisprudential problems which are worth considering. What emerges is that unexpected areas of the Treaty of Rome exhibit signs of vulnerability to human rights scrutiny and that the recipients of the benefits of rights, in so far as there would be recipients, would be unusual since most would be corporate entities. This suggests that the accession debate transcends issues of supremacy of EC law and raises deeper, philosophical concerns as to the nature of rights within a legal order such as the EC.

The intention is to show, through the case-law of the ECJ, that the EC perception of rights is motivated by a functional approach, namely the desire to secure the aim of the single market. The EC is not concerned about the protection of the rights of the individual and indeed there are only two instances in which the language of rights has been deployed in the defence of the individual. Instead human rights language has been invoked to ensure the adherence of Member States to the single market in goods, services, persons and capital.

Although the primary aim of the EC has always been economic in nature, it is clear from the Treaty of Rome that other goals were also contemplated. The preamble to the Treaty of Rome spoke of the "ever closer union of the peoples of Europe". The EC was also to be viewed as "providing the basis for a broader and deeper community among peoples... and [as laying] the foundations for institutions which will give direction to a destiny henceforth shared." There is no mention of the protection of civil liberties or human rights in the original Treaty of Rome. Indeed, any mention of the role of human rights in the Communities had to wait until the Single European Act

(SEA), an amendment to the Treaty of Rome signed in 1987. The preamble to the SEA states that the Member States are "determined to work together to promote democracy on the basis of the fundamental rights recognised in the constitutions and laws of the Member States, in the European Convention on the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice."

Even if there is no formal accession to the ECHR, the continued sensitisation of the EC to human rights will mean that the actions of Member States will be scrutinised more closely for consistency with human rights norms and individuals will be given greater remedies against the state.[1] The same protection against failures on the part of EC institutions may not however be as forthcoming.

1. The European Parliament and Human Rights

1.1. The Joint Declaration

Although human rights was not strictly within the competence of the Treaty of Rome, the European Parliament has a long tradition of highlighting human rights problems world-wide. As far back as 1977 the European Parliament together with the Council and the Commission issued a Joint Declaration[2] which is worth recalling as it serves to illustrate the emerging interest in the protection of human rights:

> "The European Parliament, The Council and the Commission,
> Whereas the Treaties establishing the European Communities are based on the principle of respect for the law;
> Whereas, as the Court of Justice has recognised, the law comprises, over and above the rules embodied in the treaties and secondary Community legislation, the general principles of law and in particular the fundamental rights, principles and rights on which the constitutional law of the Member States is based;
> Whereas, in particular, all the Member States are Contracting Parties

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1 Francovich v. Italian State (6&9/90) (1992) IRLR 84; see also Article G(51) of Treaty on European Union (Maastricht).

2 Adopted 5 April, 1977.

to the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950,
Have adopted the following Declaration:
1. The European Parliament, the Council and the Commission stress the prime importance they attach to the protection of fundamental rights, as derived in particular from the constitutions of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms.
2. In the exercise of their powers and in pursuance of the aims of the European Communities they respect and will continue to respect these rights."

This Joint Declaration is partly a reflection of the need to compensate for the omission of human rights from the Treaty of Rome and underlines the role of the Court in developing a method of protecting human rights within the existing framework. It may also be the embodiment of the unease felt by the institutions working within a treaty arrangement that does not mention human rights while simultaneously linking the external policies of the Communities with human rights.[3] Most significantly though, the Joint Declaration makes specific reference to the ECHR as a model for human rights protection within the EC.

1.2 Declaration of Fundamental Rights and Freedoms

Since the Joint Declaration there have been other, more ambitious attempts to introduce human rights into the agenda of the EC. The SEA is important in this respect of course, as is the 1989 European Parliament's Declaration of Fundamental Rights and Freedoms[4] which is a catalogue of rights specific to the EC. The Parliament has been urging the Council, with the support of Spain in particular, to adopt this as the binding human rights code for the EC.

The 1989 Declaration draws inspiration from many sources: the Single European Act; the case-law of the ECJ; the constitutions of Member States; and the special responsibility of the European Parliament as the only directly

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3 See below p. 8.

4 [EP] 12 April 1989, OJ 1989 C 120/51.

elected body of the EC to develop a model for European society.[5] The Declaration anticipates a widening gap in the protection of the rights of citizens in an expanding Community which is inevitably expected to take on board issues of justice and home affairs.[6]

The Declaration includes rights found in most catalogues of this nature such as Article 2 which states that,

> "Everyone shall have the right to life, liberty and security of person"

and Article 19 which provides that,

> "1. Everyone whose rights and freedoms have been infringed shall have the right to bring an action in a court or tribunal specified by law.
> 2. Everyone shall be entitled to have their case heard fairly, publicly and within a reasonable time limit by an independent and impartial court or tribunal established by law...".

There are also provisions on freedom of thought[7], expression[8], information[9], privacy[10], and assembly[11], the right to choose an occupation[12] and to have an education[13]; and the protection of the family.[14] Further provisions also deal

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5 Direct elections for the European Parliament have been held since 1979 (see Article 138(1) of the Treaty of Rome).

6 Maastricht adds new "pillars" of inter-governmental co-operation in the areas of justice and home affairs; foreign policy and security matters; and economic and monetary union.

7 Article 4.

8 Article 5.

9 Article 5.

10 Article 6.

11 Article 10.

12 Article 12.

13 Article 16.

14 Article 7.

with collective social rights[15], social welfare[16], the ownership of property[17] and the death penalty.[18] More unusual provisions are also present such as Article 24 which states that,

> "1. The following shall form an integral part of Community policy:
> - the preservation, protection and improvement of the quality of the environment,
> - the protection of consumers and users against risks of damage to their health and safety and against unfair commercial transactions.
> 2. The Community institutions shall be required to adopt all the measures necessary for the attainment of these objectives."

The underlying importance of the principle of legitimacy[19] is also stressed in Article 17 which states that,

> "1. All public authority emanates from the people and must be exercised in accordance with the principles of the rule of law.
> 2. Every public authority must be directly elected or answerable to a directly elected parliament.
> 3. European citizens shall have the right to take part in the election of Members of the European Parliament by free, direct and secret universal suffrage.
> 4. European citizens shall have an equal right to vote and stand for election.
> 5. The above rights shall not be subject to restrictions except where such restrictions are in conformity with the Treaties establishing the European Communities."

A cursory glance at the catalogue of rights in this Declaration shows that it is not an attempt to provide comprehensive civil liberties protection. There is,

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15 Article 14.

16 Article 15.

17 Article 9.

18 Article 22.

19 For further discussion of the principle in the broader context of international law see T. Franck, The Emerging Right to Democratic Governance, 86 American Journal of International Law, [1992] p. 47.

for example, no provision for the rights of suspects who are detained, which in an increasingly federal structure would be bound to assume greater importance. There is also no mention of a system for the redress of violations of the rights contained in the Declaration. It is further limited in that it applies to nationals of Member States only. The Declaration also covers rights different from those in the ECHR. It is considered that they are more appropriate to the activities and competences of the EC. Thus, the right to pursue an occupation, to good working conditions, rights in respect of social welfare and other collective rights are all absent from the ECHR but are in the Declaration.

Many of these rights are clearly of an aspirational nature, so it would seem that the value of the Declaration lies in its symbolic significance rather than in any potential it might have as another tier of scrutiny of EC activities. It could also be argued that the Declaration does more harm than good. It could be said to detract from the primary goal of EC accession to the ECHR, and to contribute to the dilution of an effective human rights standard for the EC in that is yet another code to consider in the absence of a proper system under the ECHR. Later on in the chapter we consider what might be included in an acceptable code designed specifically for the EC should that prove to be an available route to be pursued.[20]

2. European Court of Justice Case-Law

The European Court of Justice (ECJ) has also created legal concepts which allow Community law to penetrate the domestic legal systems of Member States in a manner which is far greater than that enjoyed by international law. Through the doctrine of direct effect the ECJ has made EC treaties, decisions and secondary legislation, such as directives and regulations, directly enforceable by individuals in their national courts.[21] For example, if the right to move freely throughout the EC as a worker is hampered it is possible to seek redress in the national court, and unnecessary in such circumstances to take the case to the ECJ in Luxembourg.

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20 See below p. 38.

21 Regulations may be invoked against individuals and the State but directives may only be invoked against the State or emanations of the State (see further *Marshall v. Southampton Area Health Authority*. (152/84) [1986] ECR 723). Treaty provisions can also enjoy direct effect.

3. External Relations and Human Rights

In addition to the work of the European Parliament in highlighting human rights, the EC Council has also raised the issue in its external relations with the rest of the world. In its development co-operation policy, the EC has linked financial and technical assistance to the protection of human rights. Acting on the Declarations already mentioned, as well as the preamble to the Single European Act, the EC has established its relations with Latin America, Africa and Asia on the basis of the human rights records of the various countries concerned.[22] More recently the EC has also linked recognition of states, in particular the former Yugoslavia, to human rights criteria. The Lomé Convention which governs the EC relations with certain African, Caribbean and Pacific countries makes specific mention of the need to protect human rights and democratic values. In Article 5 of the Lomé (IV) Convention it states that,

> "Co-operation shall be directed towards development centred on man, the protagonist and beneficiary of development, which thus entails respect for and promotion of all human rights. Co-operations, operations shall be conceived in accordance with the positive approach, which respect for human rights is recognised as a basic factor of real development and where co-operation is conceived as a contribution to the promotion of these rights. In this context development policy and co-operation are closely linked with the respect for and enjoyment of fundamental human rights.
> Hence the Parties reiterate their deep attachment to human dignity and human rights, which are the legitimate aspirations of individuals and peoples. The rights in question are all human rights, the various categories thereof being indivisible and inter-related, each having its own legitimacy; non-discriminatory treatment; fundamental human rights; civil and political rights; economic, social and cultural rights..."

Even outside Lomé it has become EC practice vis-a-vis third countries to

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22 Commission Communication to the Council and Parliament on "Human Rights, Democracy and Development Co-operation Policy", SEC (91) 61 Final. Several Council meetings were also devoted to this matter such as the Dublin Council (June 1990) on human rights and good governance in Africa and the Rome Council meeting (December 1990) on the promotion of democracy and human rights in external relations.

condemn publicly violations of human rights; to approach countries where there is concern about flagrant violations; and to take steps to encourage respect for human rights. Other co-operation agreements that are noteworthy for their linkage of aid to human rights include the Co-operation Agreement with the parties to the General Treaty on Central American Economic Integration (1985) and agreements with Chile, Argentina, and Mexico all of which were concluded during 1990. The EC Commission has stated that in considering issues of aid and trade the "internal developments in the societies of the developing countries occupy a prominent place among the factors to be considered."[23] Indeed, this is borne out by the fact that negotiations with ASEAN (Association of South-East Asian Nations) for a new co-operation agreement have been stalled because of Portugal's concern at Indonesia's record on human rights abuses in East Timor.

Within the Conference on Security and Co-operation in Europe (CSCE), the EC has also taken the lead in establishing a human rights dimension to the process.[24] States may request further information and possible investigation of cases (even individual ones), that raise human rights issues. EC concern over human rights abuses in Romania, for example, was noted and a condemnatory statement to this effect was issued. In addition to the ECHR the Council has also referred in its external relations policies to the United Nations Charter, the Universal Declaration of Human Rights and the Covenants on civil and political rights and economic, social and cultural rights.[25]

The EC has also attempted to co-ordinate its policy on the recognition of the former Yugoslavia and the Baltic states by applying human rights criteria as laid down in the Declaration on Yugoslavia[26] and the Declaration on the Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union.[27] This policy was applied by an Arbitration Commission which has

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23 See note 21 above.

24 See further the Copenhagen Meeting of the CSCE of 29 June 1990, 29 International Legal Materials 1305 and the Moscow Meeting of 3 October 1991, 30 International Legal Materials 1670.

25 See Commission Communication above, note 21.

26 European Political Co-operation, Press Release, 1 September 1991.

27 European Political Co-operation, Press Release, 16 December 1991.

become known as the Badinter Commission.[28] It is interesting to note that the EC did not follow the recommendations of the Badinter Commission consistently and in the cases of Bosnia-Hercegovina and Croatia[29], for example, granted recognition even though this Commission was unconvinced that the ideals of democracy and human rights were adequately catered for.[30]

4. The Maastricht Treaty

The Maastricht Treaty which creates a European Union[31], is the most recent manifestation of the call for human rights to become part of the European Union legal order. The preamble to the Maastricht Treaty recounts the Member States:

> "attachment to the principles of liberty, democracy and [their] respect for human rights and fundamental freedoms and... the rule of law."

The specific recognition of this attachment is in Article F which provides that,

> "The Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States as general principles of Community law."

The Maastricht Treaty provisions on Justice and Home Affairs also contain references to other human rights standards. In Article K.2 the Treaty states that matters in this area, such as asylum and immigration,

> "...shall be dealt with in compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms ... and the Convention relating to the Status of Refugees of 28 July 1951

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28 The Arbitration Commission chaired by Mr Badinter, President of the Conseil Constitutionnel of France.

29 See 31 International Legal Materials (1992).

30 See further, I. Persaud & M. Fitzmaurice, The Modern Theory and Practice of Recognition: A Movement Towards Legitimacy, [unpublished].

31 The Treaty on European Union entered into force on 1 November, 1993.

and having regard to the protection afforded by Member States to persons persecuted on political grounds."

While these are the only direct references to human rights in the Maastricht Treaty some of the rights contained in the 1989 Declaration of Parliament have found their way into the Treaty. According to Article 8(a)(1) there is now, for example, a general right to freedom of movement within the Community for all EC citizens. Citizens of the Union are also entitled to benefit from the principle of democracy. By virtue of Article 8 citizens have the right to stand for and vote in local elections and elections for the European Parliament where they reside. The right of petition which is also in the Declaration finds expression in Maastricht in the form of the creation of a Parliamentary Ombudsman.[32]

5. Accession to the ECHR: The Balance of Advantage

5.1 Potential Benefits

The debate over EC accession to the ECHR stretches back some time.[33] At present there appears to be little political will on the part of the EC or the Council of Europe to move forward on the issue. The EC is coming to terms with the new areas of co-operation under Maastricht and the ECHR institutions for their part are occupied with more pressing concerns, such as coping with an increasingly heavy workload and advising on internal constitutional changes. Yet there is symbolic value in accession. It would make clear to the world that the EC was not just interested in the human rights records of the less-economically developed countries to whom it gives assistance, but was also concerned with its own human rights records. This would lend credibility to the external relations policies of the EC. Accession should also work to ensure the uniform application and interpretation of the ECHR within the EC so that cases like *Hoechst*[34] which we discuss below would not recur. Having a human rights instrument as part of the EC legal order would create legal

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32 See Article 8d.

33 See further report of the House of Lords Select Committee on the European Communities, Human Rights Re-Examined, HL 10.

34 Joined cases 46/87 and 227/88, judgement of 21 September 1989. For further discussion see below p. 34.

certainty and would have a potentially conditioning effect on holders of public power who would naturally be aware of this extra tier of review. In other words the more human rights are part of the vocabulary and working methods of the institutions the more likely it is that we will see an increased sensitization to human rights issues.

The present system may actually leave applicants without a remedy for alleged violations of human rights - something which would be remedied by accession to the ECHR. In *Melchers*[35] the applicants attempted unsuccessfully to challenge before the ECJ the imposition of fines by the EC Commission for breach of the competition rules on the grounds that the body had acted as both prosecutor and decision maker. They then tried to challenge, on the basis of the ECHR, the German government's implementation of this fine against them through the domestic legal system. The case was declared inadmissible; a Member State could not be subject to the human rights machinery for faithful implementation of an EC decision since acts of the EC were not within the jurisdiction of the Court of Human Rights.

Another gap in the protection of human rights is that while the secondary legislation of the EC may refer to the ECHR, the legislation may not be challenged for incompatibility with the Convention since the ECHR is not within the EC's competence. Thus the Directive on Cross Border Broadcasting[36] specifically mentions Article 10 of the ECHR, the right to freedom of expression, but it cannot be challenged in Strasbourg. Similarly those concerned with immigration law in the EC can only look to the ECHR for reference rather than for a remedy. When border controls are lifted under the Schengen agreements[37], there will be a corresponding need to ensure that genuine refugees and asylum seekers are protected. However, the ECHR will not be in the forefront as a constraint on whatever agreement is finally put in place.

It could also be argued that accession goes to the very heart of the

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35 Application No. 3258/87, Decision of 9 February 1990, not yet reported. For further discussion see below p. 33.

36 OJ (1989) L298/23.

37 Denmark, Ireland and the UK are not parties to these agreements. Austria, Sweden and Finland currently have observer status to these agreements.

"democracy deficit" of the EC. The EC cannot be seen to be judging the human rights standards of Member States while simultaneously enjoying a type of "immunity" from human rights scrutiny of its own activities. This is particularly relevant to Italy and Germany both of which continue to threaten disobedience the primacy of Community law in respect of human rights "so long as the Community does not have its own catalogue of fundamental rights".[38] These countries believe that their constitutions provide better guarantees of human rights than the EC treaties and are therefore reluctant to concede total competence to the EC in this area.

5.2 Legal Authority to Accede to the ECHR

The Maastricht Treaty does not elaborate on the legal basis that would allow the EC to accede to the ECHR or on how to overcome the problems of an international organisation being party to a human rights instrument to which only states are parties. Further only members of the Council of Europe are allowed to be a party to the ECHR and the EC of course is not a member.

Even if these issues could be resolved it is unclear what the legal basis would be for accession by the EC. The actual power might be derived from Article 235 of the Treaty of Rome which states that,

> "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures."

Given this residual power to allow the EC to fulfil their mandate in the Maastricht Treaty, which is partly an amendment to the Treaty of Rome, coupled with the authority of the preamble to the Single European Act, an

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38 *Frontini v. Ministero delle Finanze* [1974] 2 CMLR 386 at 372. See also *Deutsche Handelsgesellschaft* [1974] 2 CMLR 551. The compromise between the German constitutional courts and the ECJ came in the *Solange (II)* decision of 22 October 1986 where the German court stated that it would not review the protection of human rights in the EC so long as the level of protection was adequate by German standards. For further discussion see Brinkhorst & Schermers, Judicial Remedies in the EC (4th ed.) 1987, p. 144.

attempt could be made to accede to the ECHR. Fundamental rights have long been part of the language of the institutions - in particular the Court, and therefore this horizontal policy of accession could be fulfilled through the use of Article 235. Additionally, since all acts of the Union must be in accordance with Article F, requiring respect for fundamental rights, the EC must therefore have the mandate to accede to the standard stated in that Article by virtue of the residual powers in Article 235.

There is however resistance in some quarters to the idea that the protection of human rights is now an object of the EC or of the European Union. While it might be arguable that human rights is an objective of the Treaty of Rome and of Maastricht it cannot be argued that it is an objective of the Coal and Steel Community. The rights of citizens of the proposed Union as set out in Article 8 of Maastricht, are narrower political concerns and contain neither any mention of human rights nor any reference to Article F. Yet if human rights are not accepted as a clear objective of the Member States, then Article 235 cannot be used.

Given these difficulties it seems to be clear that the best route would be for a specific amendment of the Treaty of Rome, in accordance with Article 238.[39] This would allow an inter-governmental conference to debate the issues fully, and remove any legal ambiguities that might hinder accession. However, regardless of whether the EC accedes to the Convention under Article 235 or makes use of Article 238 there are a number of institutional, political and jurisprudential problems that would need to be addressed.

5.3 Institutional and Political Issues

The Convention system in Strasbourg has of course its own machinery of a Commission, Court and Council of Ministers. Should the EC accede to the Convention, the issue of representation on these bodies would arise. There is the added complication that the Member States to the EC are all also parties

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39 Article 238 states that, "The Community may conclude with a third State, a union of States or an international organisation agreements establishing an association involving reciprocal rights and obligations, common action and special procedures. These agreements shall be concluded by the Council, acting unanimously and after receiving the assent of the European Parliament which shall act by an absolute majority of its component members. Where such agreements call for amendments to this treaty, these amendments shall be first adopted in accordance with the procedure laid down in Article 236".

to the Convention. If they were to be represented in these bodies other parties to the Convention might consider that they were being given special status, in the form of effective "double representation". In the Council of Ministers the political ramifications of double representation would be particularly acute. The EC Commission has argued that representation in the Council of Ministers is not necessary "since a higher degree of protection is offered by a judgement of the Court (of human rights)".[40] However, since it is the Council of Ministers that is charged with the responsibility of ensuring that judgements of the Court are properly implemented then it does seem important that all parties, including the EC, should be represented.

Representation on the Court of Human Rights is also a contentious issue. There are at least four options available. The ECJ could decide to refer all cases involving a right under the Convention to the Court in Strasbourg. This would be a straight case of the ECJ giving up jurisdiction to deal with fundamental rights in so far as the matter was covered by the Convention. It is the solution that would probably be most favoured by the Strasbourg organs since it would preserve intact the integrity of the Court of Human Rights to pronounce on human rights violations and would allow the Court to develop its jurisprudence in a consistent manner. However, it is unlikely that the ECJ will accept such a situation since the Court considers that it is the final arbiter in all issues of EC law, including issues of fundamental rights. This is in keeping with the doctrines of supremacy and direct effect. The ECJ would therefore be unwilling to have another court pronounce on matters within EC competence.

A second option would be the establishment of a new joint court. The recent experience of the conclusion of the European Economic Area Agreement (EEA)[41] between the EC and EFTA is testimony to the reluctance of the ECJ to part with any jurisdiction - real or perceived. The draft EEA agreement envisaged the creation of economic integration between the EFTA and EEC and in this context it was agreed that there would be a joint court made up of judges from the EFTA countries and the ECJ.

In accordance with the procedure in Article 228(1) of the Treaty of Rome, the

40 Commission Communication of November 1990.

41 European Economic Area Agreement, [1992] 1 CMLR 921.

Commission, Council or a Member State may obtain an opinion of the ECJ as to whether an agreement negotiated by the EC but not yet concluded, is compatible with existing obligations under the Treaty. A negative ECJ decision may only be overridden by using the procedure for amending the Treaty. When the draft EEA agreement was put before the ECJ in accordance with Article 228(1) the Court raised several objections and therefore the agreement had to be re-drafted.[42] The objections of the ECJ centred around its concern that its jurisdiction was being undermined in areas of EC competence. The ECJ objected, for example, to ECJ judges sitting on a joint court since this could create a conflict of loyalties. It also objected to the fact that the ECJ rulings on interpretation were merely advisory and insisted that giving non-binding opinions would undermine the dignity of the ECJ. Most of all the ECJ believed that a joint court would hamper their freedom to develop EC law since the shape of future EC law would be influenced by the EEA court.[43]

Given this stance, the possibility of a joint court was abandoned. Instead an EFTA Court is being set up which will work informally with the ECJ.[44] The Community Court remains firmly in control of the interpretation and application of the EEA agreement. On the basis of this experience the second possible institutional court arrangement of a joint court made up of judges from the Strasbourg court and from the ECJ is unlikely to be greeted with enthusiasm, and is still less likely to receive ECJ approval.

The third option is for the ECJ to retain total jurisdiction in all matters concerning fundamental rights - even where there is reference to the ECHR. The ECJ could decide for itself that it has the competence to pronounce on human rights violations based on the ECHR even though the issue appears to be outside the scope of existing EC law. This is entirely possible in a so-called "mixed agreement" where the parties to the treaty (in this instance the ECHR) are both the Member States in their individual capacities and the EC

42 Opinion 1/91, [1992] 1 CMLR 245 and Opinion 1/92 [1992] 2 CMLR 245.

43 See further, T. Hartley, The European Court and the EEA, 41 International and Comparative Law Quarterly (1992) 841; Burrows, The Risks of Widening Without Deepening: A Note on Opinion 1/91, [1992] 17 European Law Review 352; Schermers, Note on Opinion 1/91 and 1/92 [1992] 29 Common Market Law Review 991; Schoneveld, The EEC and the Free Trade Agreements, [1992] Journal of World Trade Law 59; Norberg, The Agreement and the EEA, [1992] 29 Common Market Law Review 1171.

44 Work of the Court began on 1 January 1994.

acting as a collective body. The Court of Human Rights might however take objection to such a dilution of its power and control over the ECHR.[45]

Perhaps a fourth option would be for the instigation of a procedure similar to the preliminary ruling mechanism under Article 177 of the Treaty of Rome. Under this procedure Member States can request, and in some cases may be obliged, to seek a ruling of the ECJ, on issues concerning the validity and interpretation of the Treaty of Rome. In the same way the ECJ could request rulings from the Court of Human Rights on questions involving the ECHR[46] either at the request of the parties or the ECJ itself. There could be a time limit so that if there was no dissent from the Strasbourg court as to the ECJ's interpretation of a particular right within, for example six months, then the ECJ could proceed. This would inevitably mean a degree of subordination of the ECJ to Strasbourg as regards the interpretation and application of the ECHR, but it might prove to be a workable compromise.[47]

Assuming that the issue of representation of the EC is resolved, there are other important institutional and procedural questions that are raised by the possibility of accession to the ECHR. It is a condition of admissibility of a claim under the ECHR that local remedies be exhausted. For the purpose of the EC as a party to the ECHR, when would this condition be fulfilled? One possibility is for the ECJ to be considered an internal court for the purposes of the Convention. Alternatively, this provision could be waived by respondent governments. There is the further question of who should be the proper defendant in a case where a Member State of the EC, in execution of EC law, was alleged to have violated the Convention. This is the issue that arose in the *Melchers*[48] case. It could be left to the discretion of the Court of Human Rights to determine the proper parties to each action, but there remains uncertainty.

One would also be obliged to consider whether Member States of the EC could bring actions against each other in the field of application of EC law

45 Indeed, in *Melchers* it has already sounded a warning note to this effect.

46 The most prominent call for this particular route is by Judge Lenaerts of the Court of First Instance of the EC in European Law Review, 1991, p. 367.

47 This would also avoid instances like *Hoechst* (see above 34 note).

48 See below p. 33.

where there was an alleged violation of the Convention. In such a case use could be made of Article 62 of the Convention which precludes issues relating to "internal management" from its jurisdiction. Also relevant would be Article 219 of the Treaty of Rome which suggests that such disputes are within the sole competence of the ECJ.[49] As previously noted there is also the obvious problem that only parties to the Council of Europe (who are of course all states rather than international organisations) may presently be parties to the ECHR. To accommodate the EC Article 66 of the ECHR would have to be amended.[50] Whatever institutional solution is achieved, it is clear that accession would burden the already backlogged Court of Human Rights and create delays and greater expense for individuals seeking redress.

Only two Member States of the EC - Greece and Italy - are unreservedly in favour of the EC's accession to the ECHR. Many Member States consider that the gap in the protection of fundamental rights is more a perceived than a real gap or that at any rate the gap is marginal. On this view, instead of accession the EC should concentrate on the development of general principles of EC law such as non-discrimination, legal certainty and proportionality to safeguard rights. The accession by the EC would also affect Member States who have negotiated reservations to the Convention or not ratified certain protocols. Indeed, since Article F of the Maastricht Treaty does not mention the protocols specifically there is some doubt as to whether they are even included. Furthermore, the actual process of accession is likely to be long and cumbersome and it is argued that it should not be undertaken without some urgent rationale.

6. Implications of Accession for National Decision on Incorporation

Three Member States of the EC - the United Kingdom, Ireland and Denmark - have ratified but not incorporated the Convention into domestic law. Accession by the EC would seem to be a device to force the hand of these countries since they would be required to incorporate the ECHR into domestic law in so far as it would be an obligation under EC law and would

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49 Article 219 states that, "Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein."

50 Article 66 of the ECHR states that, "This Convention shall be open to the signature of the members of the Council of Europe...".

take immediate effect under the doctrine of supremacy. This has given rise to fear of incorporation by the "back door". However this "backdoor" is already being used.[51] An example is the *Heylens*[52] case where the ECJ specifically referred to Articles 6 and 13 of the ECHR in arriving at a decision concerning EC rules on mutual recognition of qualifications (to which all Member States are bound).[53] Moreover, accession by the EC would only affect the legal systems of Member States with regard to EC legal acts. It would not stray into areas outside EC competence. The fears of states who have not incorporated could also be calmed by an acknowledgement that many of the standards set in the Convention are already part of EC law through the affiliation of general principles of EC law. What would be new would be that citizens of the Union would be able to invoke the ECHR to achieve direct redress in relation to action taken by the EC.

7. The ECJ: Reconstructing Human Rights

Despite the debate about accession, there has been little discussion of exactly what impact on EC law such a change would have. Indeed, even the consequences of the ECJ's development of its own human rights jurisprudence have not been fully understood. In this regard the debate about human rights in the EC has taken place at too high a level of abstraction. When we turn to the detail, it is clear that unexpected areas of EC competence such as competition, the provision of goods and services and agriculture are vulnerable to human rights scrutiny. In carrying out policies in these areas the EC or the Member States might be in breach of the ECHR on, for example, the right to fair trial or freedom of expression. There are also potentially rather unusual recipients of these rights, including for example multinational enterprises.

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51 See further Schermers, Memorandum to the House of Lords Select Committee (see note 33 above), p. 54-56.

52 *UNECTEF v. Heylens* (222/86), [1987] ECR 4097.

53 The Court stated that, "Since free access to employment is a fundamental right which the Treaty confers individually on each worker in the Community, the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right is essential to secure for the individual the effective protection for his right... That requirement reflects a general principle of law which underlies the constitutional traditions common to the Member States and has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms".

Furthermore, the human rights jurisprudence developed by the ECJ only incidentally concerns the protection of the fundamental rights of the individual. The Community Court offers little or no concrete assistance to individuals and has been concerned instead with advancing the "unique legal order" of *Van Gend en Loos*[54] and the completion of the single market. A *Celex* search revealed at least 63 cases involving a question of human rights. *In only two of these cases, Kent Kirk*[55] *and Wachauf*[56] *did an individual actually receive a concrete benefit from the ECJ's stance on rights.* Most interestingly these cases concerned the incompatibility of national legislation with the provisions of the ECHR, not the compatibility of EC legislation. The ECJ has always maintained that it will act on fundamental rights issues in the context of EC law only. It has been very cautious and consistent in demarcating jurisdiction between itself and Member States. However, an analysis of the case-law of the ECJ suggests that it is really concerned with using human rights as a means with which to penetrate areas of Member States' competence - areas which were previously their exclusive domain.

This goes against the view that the international law on human rights is in part an attempt to balance state and individual interests, the effect of which is to allow States to set their own house in order in keeping with notions of sovereignty, but subject to external scrutiny. The ECJ appears on the contrary to be bent on usurping Member States' power to rectify their own problems *while simultaneously making itself and the acts of EC institutions immune to scrutiny by reference to human rights standards.*

Many argue that the case-law of the ECJ on fundamental rights is inadequate, incoherent and sometimes plain wrong. For example, the substantive protection of rights offered, and the margin of appreciation given to States differs markedly as between the ECJ and the Court of Human Rights. There is, however, a deeper concern about the very nature of the ECJ's interest in human rights. If we are to view human rights from a capitalist, single market stance then the case-law of the ECJ is both adequate and coherent and developing in response to the needs of the EC. Human rights in terms of individual protection does not enjoy precedence over norms governing the free

54 Case 26/62 [1963] ECR 1.

55 Case 63/83 [1984] ECR 2689.

56 *Wachauf v. Federal Republic of Germany* (5/88) [1989] ECR 2609.

movement of goods, persons, services and capital. Through the eyes of a civil liberties lawyer, however, the gaps and mistakes are glaring. Human rights norms are viewed as fundamental and superior to other norms. Some are even jus cogens - such as the right to life and freedom from torture. It would never be possible, from a civil liberties stance, to equate the freedom of expression with the free movement of goods. Yet this is precisely what the ECJ has done in the cases below. The assessment made of the case-law then is really a reflection of a view of rights, in particular whether they are a tool of economic power, or a reflection of standards of conduct in relation to the treatment of individuals.

What is clear is that the ECJ has failed to develop a construction of rights which is grounded in the tenets of individual liberty. It has instead reconstructed these rights in terms of other requirements such as supremacy of Com-munity law and the completion of the single market in goods, services, capital and persons.[57]

7.1 The early Case-Law

Early case-law of the ECJ[58] reveals that the notion of the protection of fundamental rights was not the initiative of the Court, but was rather thrust upon it by some Member States' demanding that if the ECJ were not to protect rights at least as well as their domestic constitutions did, then they reserved the power to act where such rights were concerned. In other words these countries were asserting that there would be no supremacy of EC law on questions of fundamental rights, if EC law did not provide adequate protection. In *Stork*[59] the ECJ was asked to consider whether an EC measure,

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57 See further, J. Coppel & A. O'Neill, The European Court of Justice: Taking Rights Seriously?, Common Market Law Review 29: 669-692, 1992.

58 For discussions of the development of the case-law see R. Dallen, An Overview of European Community Protection of Human Rights, With Some Special References to the UK, Common Market Law Review 27: 761-790, 1990; A. Clapham, A Human Rights Policy for the European Community, Yearbook of European Law (1990), p.309-366; McBride & Neville Brown, The United Kingdom, The European Community and the European Convention on Human Rights, Yearbook of European Law (1981) 167; Mendelson, The European Court of Justice and Human Rights, Yearbook of European Law (1981) 121; Mendelson, The Impact of European Community on the Implementation of the European Convention on Human Rights, Yearbook of European Law (1983) 99.

59 *Friedrich Stork & Co. v. High Authority of the European Coal and Steel Community* (1/58) [1959] ECR 17.

imposed on the Ruhr coal-mining industry, which affected the applicant, violated Articles 2 and 12 of the German Basic Law governing the free development of the individual and occupational freedom respectively. The ECJ rejected jurisdiction stating that the EC institutions had only to act in accordance with EC law and did not need to be mindful of rules of internal law, such as constitutional guarantees.[60] The ECJ took a similar stance in *Ruhrkohle-Verkaufsgesellschaft*[61] where the applicant invoked Article 14 of the German Basic Law relating to the right to enjoyment of private property by again declining to examine the legality of action by a EC institution by reference to the constitution of a State.

A slight shift in attitude is detectable in the case of *Stauder*.[62] The decision concerned the EC's butter mountain. Member States were authorised to dispose of surplus butter at a reduced rate to those in receipt of social assistance. One such beneficiary, a citizen of Ulm, felt his human dignity affronted by being forced to disclose that he was on social assistance in order to receive the butter. The ECJ was asked by way of reference from the German courts to rule on the compatibility of this requirement with the general principles of EC law. The German courts also indicated that if the EC could not protect rights adequately they reserved the power to provide effective protection of fundamental rights themselves - even in areas of EC competence. Therefore, in the unexpected context of melting the butter mountain, the ECJ clashed head-on with a Member State over the protection of fundamental rights. The matter was eventually resolved through a technicality with the ECJ deciding that the German text of the regulation was the cause of the difficulty (and *not* the regulation itself) since it did not match other language versions of the regulation. It was therefore the fault of the Member State and not the EC. However what was particularly interesting was that the ECJ used the oppor-

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60 The ECJ held that "... the High Authority is not empowered to examine a ground of complaint which maintains that, when it adopted its decision, it infringed principles of German constitutional law."

61 Cases 36,37, 38 & 40/59 [1960] ECR 423. The ECJ held that "Community law, as it arises under the ECSC Treaty, does not contain any general principle, express or otherwise, guaranteeing the maintenance of vested rights". It is worth noting that Advocate General Lagrange considered that the Court would be bound to consider the issue of vested rights where appropriate in so far as it became an expression of a general principle of law.

62 *Erich Stauder v. City of Ulm, Sozialamt,* (29/69) (1969) ECR 419.

tunity to state *"that, as interpreted, the provision at issue does not reveal any element jeopardizing basic individual rights implicit in the general principles of Community law, which the Court ensures shall be observed"*. This dicta represented a significant development on the earlier case-law.

The next opportunity for the Court to develop its ideas on human rights came in the case of *Internationale Handelsgesellschaft*[63], a decision once again concerning agriculture. Farming regulations of the EC provided for a system of "agricultural deposits". Several German firms challenged the validity of this system stating that it violated German constitutional law[64] and that this also inevitably involved a violation of EC law since EC law encompassed German constitutional guarantees. The ECJ emphasised the autonomy of the EC legal order and rejected the introduction into EC law of concepts of a wholly national character. The Court emphasised that,

> "... the validity of a Community instrument or its effects within a Member State [could not] be affected by allegations that it strikes at either the fundamental rights as formulated in that State's constitution or the principles of a national constitutional structure."

The ECJ went on to declare that

> "an examination should, however, be made as to whether some analogous guarantee inherent in Community law, has not been infringed. For respect for fundamental rights has an integral part in the general principles of law of which the Court of Justice ensures respect. The protection of such rights, while inspired by the constitutional principles common to the Member States must be ensured within the framework of the Community's structure and objectives".

Using its own definition of the content of rights contested, the Court then found that there had been no violation. It is this case which also marks a shift

63 *Internationale Handelsgesellschaft m.b.H. v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, (11/70) [1970] ECR 1125.

64 The company maintained that the loss of the deposit on the land was a violation of its basic rights and liberties and further that ratification of the Treaty of Rome had not overridden the German Constitution's provisions in Article 24(1) which states that, "The Federation may by legislation transfer sovereign powers to intergovernmental institutions."

in the jurisdiction of Member States in that the ECJ is stating that it will protect fundamental rights and that therefore this area is no longer within the exclusive competence of the Member States. The German constitutional court did not, however, accept this position and cited as one of its reasons the fact that the EC "lacks in particular a codified catalogue of fundamental rights".[65]

While not making any attempt to instigate the creation of such a code, the ECJ was shifting its stance and ensuring that it would have greater opportunities to review acts (especially of Member States), by reference to human rights. In the second *Nold*[66] case the Court specifically mentioned the ECHR as an additional source of reference for its development of EC-based "fundamental rights". Nold, a wholesaler, challenged the legality of a Commission decision requiring minimum purchases of coal and which would have put him out of business. He relied on several grounds, including a breach of his fundamental rights concerning the right to property. His action was dismissed as groundless, but the Court decision referred to a catalogue of rights which were described as an integral part of the EC system for the protection of individual liberty. The ECJ stated that,

> "In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognised and protected by the constitutions of those states. Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories can supply guidelines which should be followed within the framework of Community law."

It was to be some time before it became clear that the hopes raised by the second *Nold* case were not to be realised. The perfect opportunity to elaborate on an understanding of rights grounded in individual liberty towards which *Nold* was tentatively reaching, came in the *Van Duyn*[67] case. Ms Van Duyn

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65 This is an argument that continues to be an issue, see further Bundesverfassungsgericht, Judgment of 12 October 1993 (BvR 2134/92 and 2 BvR 2153/92, [1994] 1 CMLR 57).

66 Case 4/73 [1974] ECR 491.

67 *Yvonne Van Duyn v. Home Office* (41/74) [1974] ECR 1337.

was a Dutch scientologist who wished to take advantage of the free movement of workers within the EC territories and work in the UK for the Church of Scientology. She was refused admission to the UK on the ground that a Member State could derogate from this right by reason of public policy and the UK considered the Church of Scientology an undesirable organisation (whilst nevertheless allowing it to continue operating). A reference was made to the ECJ in which the Court agreed that this was a permissible derogation. The Court allowed the UK a wide margin of appreciation even though there was a conflict between the Government's action and Article 7 of the Treaty of Rome. Article 7 stipulates that there may be no discrimination on grounds of nationality.[68] This decision allowed the UK effectively to discriminate between UK scientologists and Dutch scientologists. The loser in this case was of course the individual.

It was quite clear that the ECJ did not wish to upset the UK in this, its first preliminary reference to the Court. The case also coincided with the referendum campaign to decide the UK's continued involvement in the EC. It was better to sacrifice Ms Van Duyn than UK membership of the EC club. The case also served as an opportunity for the Court to advance the then tenuous concept of direct effect of EC law, stating that Ms Van Duyn could invoke the Treaty of Rome directly in proceedings before a national court. There is little to be gained, however, from invoking a Treaty provision when the ECJ will sanction derogation of the right to non-discrimination and the freedom to pursue an occupation of one's choice on policy grounds that are divorced from all notions of individual rights and liberties.

The greater margin of appreciation given to states in *Van Duyn* was further illustrated by the case of *Rutili*.[69] Rutili was an Italian national born in France and living there. He was also married to a French national. His participation in certain political activities led the authorities to declare him a person "likely to disturb ordre public" and to ban him from living in certain areas of France. Mr Rutili challenged the authority of the French to limit his residence permit in this manner and the Administrative Tribunal made a reference to the ECJ.[70] The Court recalled *Van Duyn* and the second *Nold* case to make it

68 Article 6 of the EC Treaty.

69 *Roland Rutili v. Minister for the Interior* (36/75) [1975] ECR 1219.

70 The reference under Article 177 was to establish whether this was an acceptable limitation of the free movement of workers within the meaning of Art. 48(3).

clear that the free movement of workers was a fundamental Community right that could be directly invoked and that the Court could take account of general principles, the constitutions of Member States and treaties in coming to a decision.

The ECJ then expressly invoked the ECHR for the first time in the following way:

> "Taken as a whole, these limitations placed on the powers of Member States in respect of control of aliens are specific manifestation of the more general principle, enshrined in Articles 8, 9, 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 and ratified by all the Member States, and in Article 2 of the Protocol No 4 of the same Convention, signed in Strasbourg on 16 September 1963, which provide, in identical terms, that no restrictions in the interests of national security or public safety shall be placed on the rights secured by the above-quoted articles other than such as are necessary for the protection of those interests in a democratic society".

Rutili is important for the fact that the ECJ was developing its jurisprudence by reference to the ECHR. Note, however, that it was invoking this strong language of individual rights in the context of a challenge to the *action of a Member State*, not an EC institution. Where Member State action is concerned the ECJ now appears prepared, in the right circumstances (which did not exist in *Van Duyn*), to consider that fundamental rights pertain to the whole of the territory of a Member State. Derogation from these fundamental rights is only possible by reference to public security, public health, or public policy as understood in the context of the ECHR. However, the ECJ also held that where the ban was not a total ban from the territory, but rather a partial restriction on movement within the Member State, the test of legitimacy was whether this ban would have been permissible in relation to a national of that state. In other words in Mr Rutili's case it was only necessary for the state to show that this action was non-discriminatory. The Court further argued that the Treaty of Rome could not be used to extend more favourable treatment to a foreign EC national than was enjoyed by one's own nationals. This left it open to the French court when applying the ruling to exclude Rutili from

areas of France if the same fate could lawfully befall a French national.

It has been argued that the approach of *Rutili* in so far as it deals with total exclusion from a territory, goes even further than the Court of Human Rights in terms of the protection of individuals, although ultimately the decisions by the two courts may not be too different in practice. In the case of *Paramanathan v. Germany*[71] before the Strasbourg Commission for example, Mr Paramanathan was limited to living in certain areas of Germany while his request for political asylum was being considered. The Court of Human Rights decided that it should be left to the Member State to determine the conditions to be fulfilled for a person's presence to be considered unlawful in a State. Greater discretion was given to the Member State to determine how best to protect the fundamental rights within Article 2(1) of Protocol 4 of the ECHR.[72] This difference from *Rutili* might be explicable not necessarily as a result of the ECJ's greater protection of rights but rather because the two Courts have different aims. The ECHR system is about laying down minimum standards while the ECJ is concerned to eliminate restrictions *by Member States* which could thwart the goal of free movement of workers in the single market. After justifying *Rutili* on the basis of the ECHR the ECJ also expanded its sources citing in *Defrenne No. 2*[73] a convention of the International Labour Organisation. This was also an instance where the ECJ allowed Article 119 of the Treaty of Rome, guaranteeing equal pay for equal work for men and women, to be invoked by Ms Defrenne against a private party, Sabena Airlines.

7.2 The Assertion of a Human Rights Jurisdiction against Member States

It was not until the *Hauer*[74] case that any in-depth analysis by the ECJ of an alleged violation of fundamental rights was undertaken, and once again a case concerning agriculture provided the opportunity. Mrs Hauer was refused

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71 Application No. 12068/86, 10 E.H.R.R. 157.

72 Article 2(1) states that, "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence."

73 *Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena* (43/75) [1976] ECR 455.

74 *Liselotte Hauer v. Rheinland-Pfalz* (44/ 79) [1979] ECR 3727.

permission to plant wines on her land on the ground that this was contrary to an EC regulation designed to adjust wine-growing potential to market requirements. The construction of the regulation was referred to the ECJ. In making the reference the German court stated that if the prohibition included land appropriate for wine growing it might be incompatible with the German Basic Law guarantees of the right to property and the right to pursue trade and professional activities.[75]

The ECJ re-stated its concern for the completion of the single market in the following terms:

> "The introduction of special criteria for assessment stemming from the legislation or constitutional law of a particular Member State would, by damaging the substantive unity and efficacy of Community law, lead inevitably to the destruction of the unity of the Common Market and the jeopardizing of the cohesion of the Community."

The Court went on to reiterate its stance that fundamental rights formed part of the EC legal order and, in doing so, drew inspiration from the constitutional traditions of the Member States and international treaties including the First Protocol of the ECHR. The right to property was a right guaranteed in the EC legal order in accordance with the First Protocol of the ECHR which also allowed limitations "necessary" for the protection of the "general interest". The ECJ then examined the national restrictions on property rights, the relationship between the measures provided for in the particular regulation and the aims pursued by the EC. It concluded that the regulation was justified "by the objectives of general interest pursued by the Community and [that it did] not infringe the substance of the right to property in the form in which it is recognised and protected in the Community legal order". A similar conclusion was reached on the freedom to pursue trade or professional activities.

Through its jurisprudence the ECJ has also commented on the distribution of power that it perceives should apply in its relationship with Member States in the context of fundamental rights. In *Cinéthèque*[76] for example the Court sta-

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75 See Articles 14 and 12 of the German Basic Code.

76 *Cinéthèque and others v. Fédération Nationale de Cinémas Français* (60-1/84) [985] ECR 2605.

ted that,

> "although it is true that it is the duty of this Court to ensure observation of fundamental rights in the field of Community law, it has no power to examine the compatibility with the European Convention of national legislation which concerns, as in this case, an area which falls within the jurisdiction of the national legislator".[77]

Later in *Demirel*[78] it had the opportunity to be even more explicit. Demirel concerned the right of a Turkish worker to bring his family into Germany. According to the ECJ the right to bring one's family into the EC was not covered by the Association Agreement between the EC and Turkey and therefore, the alleged violation of Article 8 of the ECHR dealing with the right to family life was not within EC law. The Court stated that it had

> "... no power to examine the compatibility with the European Convention on Human Rights of national legislation lying outside the scope of Community law".[79]

At first glance these two cases appear to be quite conciliatory on the part of the ECJ and even to be done in a spirit of "subsidiarity".[80] However, it is suggested that the formula for competence conceived by the ECJ is effectively a restatement of the principle of supremacy of EC law in another guise. Whenever the EC acts in a particular area it is deemed to "occupy the field" of competence in that area. Even in areas where the EC has left action to the discretion of Member states or areas where both the EC and the Member States might have equal competence to act, Member States are obliged under Articles 5 and 8 of the Treaty of Rome not to act in a manner inconsistent

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77 See para 25.

78 *Demirel v. Stadt Schwäbisch Gmünd* (12/860 [1987] ECR 3719.

79 See para 28.

80 Article 3b of Maastricht states that "... In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community." For commentary on the possible content of this principle see Commission Communication to the Council and European Parliament, The Principle of Subsidiarity (EM 36) SEC (92) 1990 final, 27 October 1992.

with the aims of a single market. It is therefore unsafe to assume that because the EC has not explicitly acted in an area it is within exclusive, national competence. It is for the Court to determine what is within EC and what is within Member State competence, and it can do this on a case by case basis.

That the Court is not overly preoccupied with deferring to Member States' sovereignty becomes clearer in the subsequent case law. In the *ERT*[81] case the Court stated that,

> "according to its jurisprudence... [see decisions in *Cinéthèque* and *Demirel*] the Court cannot assess, from the point of view of the European Convention on Human Rights national legislation which is not situated within the body of Community law. *By contrast, as soon as any such legislation enters the field of application of Community law, the Court, as the sole arbiter in this matter, must provide the national court with all the elements of interpretation which are necessary in order to enable it to assess the compatibility of that legislation with the fundamental rights - as laid down in particular in the European Convention on Human Rights - the observance of which the Court ensures.*" (italics added)

In neither *Cinéthèque* nor *Demirel* was the Court dealing with legislation that implemented EC law. The divide between what constitutes an act of the EC, and what is of a purely national character, is however not always so clear. If the Member State was implementing EC legislation, would it then have been a EC act over which the ECJ would have had competence? What if the Member State were acting as an agent for the EC - would that be enough to constitute an EC act? The dividing line between an EC act and a national act is unclear and constantly blurred as Member States realise the implications of the formulation of a single market.[82]

The extent to which the Court is eager to condemn Member States for failure to comply with the ECHR in an area involving a Community act is clear from

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81 *Elleniki Radiophonia Tileorasi (ERT) v. Dimotiki Etairia Pliroforissis* (260/89) 18 June 1991 (unreported).

82 The matter is made even more unclear with the entry into force of the Maastricht Treaty since depending on the area in which it is acting it is either the Member States acting collectively, the EC acting or the European Union acting.

the *Kent Kirk*[83] case. In this instance EC law had permitted Member States to limit fishing in their coastal waters to local or traditional fishermen until 31 December 1982. On 25 January 1983 a further regulation was made by the Council continuing this special authorisation. By virtue of Article 6(1) of this regulation the retention of this derogation applied in the UK retroactively to 1 January 1983. Mr Kent Kirk, master of a Danish fishing vessel, was charged with the offence of illegal fishing in the UK on 6 January 1983. The question of retroactivity, among other things, was referred to the ECJ by virtue of Article 177. The Court stated that,

> "Without embarking upon an examination of the general legality of the retroactivity of Article 6(1) of that regulation, it is sufficient to point out that such retroactivity may not, in any event, have the effect of validating *ex post facto* national measures of a penal nature which impose penalties for an act which, in fact, was not punishable at the time at which it was committed. That would be the case where at the time of the act entailing a criminal penalty, the national measure was invalid because it was incompatible with Community law.
>
> The principle that penal provisions may not have retroactive effect is one which is common to all legal orders of the Member States and is enshrined in Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as a fundamental right; it takes its place among the general principles of law whose observance is ensured by the Court of Justice.
>
> Consequently the retroactivity provided for in Article 6(1) of regulation 170/83 cannot be regarded as validating *ex post facto* national measures which imposed criminal penalties, at the time of the conduct at issue, if those measures were not valid".

Kent Kirk establishes that the fundamental rights jurisprudence of the ECJ can be of direct help to an individual. It is also an example of the breadth of the fundamental rights issues that the Court is willing to contemplate - at least in instances involving Member States' actions.

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83 Case 63/83 [1984] ECR 2689.

When the Court is able to construe the problem before it as referring to the legislation of a Member State, it appears to have less difficulty engaging in a full and rigourous analysis of rights than for example in the early case-law of *Stauder* and *Sgarlata* in both of which cases as we have seen, EC legislation was directly in question. In *Wachauf v. Federal Republic of Germany*[84], the applicant was a tenant farmer, whose farm was devoted exclusively to dairy farming and who had therefore obtained a milk production quota. According to a EC regulation this quota transferred on the sale, lease or inheritance of the land to the person who was taking over the farm until the surrender of the quota. Where the quota was surrendered to the state compensation fell due to the farmer. The German order which implemented this regulation stated that a tenant farmer could not surrender his quota and receive compensation without the consent of the landlord. Wachauf's landlord withdrew consent and he was deprived of his compensation. He claimed that his fundamental rights as protected by EC law had been breached since this amounted to "unconstitutional expropriation without compensation". The ECJ held that,

> "...it must be observed that Community rules which, upon the expiry of the lease, had the effect of depriving the lessee, without compensation, of the fruits of his labour and of his investments in the tenanted holding would be incompatible with the requirements of the protection of fundamental rights in the Community legal order. Since those requirements are also binding on the Member States when they implement Community rules, the Member States must, a far as possible, apply those rules in accordance with those requirements."

In spite of this statement the regulation was held to be valid. This was achieved by the Court shifting the blame entirely to the Member State claiming that it was not the EC measure but rather the *German implementing instrument* which was at fault in not providing compensation in accordance with fundamental rights standards. The German authorities did re-assess their legislation and Mr. Wachauf received compensation. The ECJ is not shy to review directly the legislation of Member States, as it does in *Wachauf*, for incompatibility with EC law and fundamental rights, but it appears unwilling to strike in the same way at the legality of EC legislation. In each instance we have examined so far where there has been a challenge to EC action it has been

84 Case 5/88 [1989] ECR 2609.

eventually construed as a fault on the part of a Member State and only when this is established does the ECJ feel inclined to rely upon an analysis of rights.

The *Wachauf* case was taken a step further by the *ERT* case referred to above in so far as it stated that,

> "measures which are incompatible with respect for human rights which are recognised and guaranteed [in EC law] could not be admitted in the Community."

Johnston v. Chief Constable of the Royal Ulster Constabulary[85] threw up another situation in which the ECJ could have given effect to individual rights grounded in notions of individual liberties but, it stopped short because it judged that the goal of the supremacy of EC law did not require such an intervention. Ms Johnston sued the RUC (the Northern Irish police force) for failure to renew her contract as a full time member of the RUC Reserve. She had been a member for six years when the Chief Constable decided that the contracts of women in the force would only be renewed in cases where the duties could only be performed by women. This was based on the rule that women were not allowed to carry firearms and could not therefore perform general police duties since these duties now required the carrying of firearms. Ms Johnston was therefore employed on a part-time basis with the RUC Reserve with the attendant lower wage that this entailed. She took her claim to the Industrial Tribunal of Northern Ireland basing it on the Sex Discrimination (Northern Ireland) Order 1976 which implemented the Equal Treatment Directive[86] in Northern Ireland. She challenged both the decision not to renew her contract and the RUC failure to provide her with training in firearms. In his defence the Chief Constable produced a certificate of the Secretary of State certified in accordance with Article 53 of the Sex Discrimination Order stating that the refusal to offer Ms Johnston full-time employment had been "done for the purpose of (a) safeguarding national security; and (b) protecting public safety and public order."

The ECJ considered that the directive in question, which contained elements

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85 [1986] 3 CMLR 240.

86 Council Directive 76/207 of 9 February 1976.

of judicial control,

> "reflects a general principle of law which underlies the constitutional traditions common to the Member States. That principle is also laid down in Articles 6 and 13 of the European Convention...As the European Parliament, Council and Commission recognised in their decisions, the principles on which that Convention is based must be taken into consideration in Community law."

The ECJ then went on to hold that the directive enjoyed vertical direct effect which meant that it could be used by Ms Johnston, an individual, against the state or any emanation of the state, such as (in this case) the RUC. However, her claim was frustrated by the fact that the Court then held that even though she could enjoy the direct benefit of EC legislation, the state could derogate from its responsibilities on the ground of public safety. The Court only went as far as was necessary to ensure that the principle of direct effect of Community acts was a reality for the state to contend with and then made this conclusion unassailable by grounding it in the language of human rights. What it failed to do was to use the language of rights to examine the extent to which the derogation in the directive complied with international safeguards as laid down in the ECHR to which the Court had referred in the course of its judgment.

What emerges from this jurisprudence is that there are implications for all EC Member States who have chosen to ratify the ECHR but particularly those who have not incorporated it into their domestic law.[87] These latter states now have to apply ECHR principles to conform with EC law at least when legislating in areas within EC competence. In *Heylens* a Belgian football trainer challenged the lack of a remedy against the French authorities for refusal to recognise his qualifications. The ECJ held that the importance of the principle of free movement of workers required that refusal to facilitate this through recognition of qualifications must be subject to judicial remedies. It stated that,

> "Since free access to employment is a fundamental right which the Treaty confers individually on each worker in the Community, the

87 See above p. 17.

> existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right is essential to secure for the individual the effective protection for his right... That requirement reflects a general principle of law which underlies the constitutional traditions common to the member states and has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms."

Another point that emerges from Heylens and other cases is that the Community Court takes the view that economic rights, such as the free movement of workers, are protected on the same basis as, or at least are not inferior to, the more traditional civil liberties, such as the right to an effective judicial remedy. For the ECJ both examples appear to be part of the same concept of fundamental rights.

7.3 The Application of the ECHR to Community Institutions and Community Law

In *Confédération Française Démocratique du Travail (CFDT) v. European Communities*[88], (or alternatively their Member States jointly and severally), CFDT, a French workers' organisation, made an application to the European Court of Human Rights citing the EC or alternatively its Member States for alleged violation of Articles 11, 13 and 14. According to CFDT the Council of the EC had failed to name them as one of the "representative organisations" from amongst whose nominees the representatives to a particular consultative committee of the EC would be chosen. CFDT, the second largest organisation of its kind in France, had been excluded - even though much smaller organisations had been selected. It was believed that the choice lay with the Member State concerned, and this was the reason for citing the Member States as well as the EC. An application was made to the ECJ to have the Council decision set aside but this was declared inadmissible since only a Member State is entitled to bring an application to set aside a decision of the Council.[89]

The European Commission of Human Rights declared the case inadmissible

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88 Application No. 8030/77, decision given on 10 July 1978.

89 See Article 38 of the ECSC treaty.

rationae personae and *rationae materiae*. It stated that it,

> "would like first to point out that the applicant is complaining of an act of an organ of the Communities, i.e. the Council of the European Communities, relating to the composition of another organ of the Communities, i.e. the Consultative Committee to the High Authority. This is an act whose effects concern the internal organisation of the European Communities who under Article 6 of the ECSC Treaty, Article 210 of the EEC Treaty and Article 184 of the EAEC Treaty have their own legal personality and are represented by their own institutions, each acting within the ambit of their powers."

Therefore, in so far as the complaint reflected concerns relating to the internal competence of the EC, the Commission declined jurisdiction *rationae materiae*. Furthermore, the Commission declined rationae personae in that the EC is not a party to the ECHR. France is however a party to the ECHR and the claim brought against the Member State had therefore to be considered more carefully. It was decided that on the facts France could not be made individually responsible. Joint responsibility of the Member States was not defined but it was believed that since it was really the Council of the EC acting, the Member States could not be made responsible. At the time of the case France had not yet accepted the right of individual petition and the Commission also considered that the other Member States were not exercising jurisdiction within the meaning of Article 1 of the ECHR.

CFDT is in some respects quite a harsh decision in that the applicants were asking for review of a potential violation of their human rights within a system which had denied them any effective means of redress. Also, the notion of the collective responsibility of the Member States should have been considered more seriously since within the Council the states should surely exercise their sovereign rights in a manner consistent with the international human rights obligations which they have willingly incurred.

A more recent decision of the European Commission of Human Rights that does raise the possibility of supervision of EC acts by the ECHR mechanism is the case of *M & Co. v. Germany*[90] (referred to as the *Melchers* case

90 Application No. 13258/87, decision of 9 February 1990 (unreported).

above). The applicants were fined under EC law for breach of the competition rules in that there was a refusal on their part to sell goods ordered for the French market. The fine, imposed by the EC Commission, was challenged before the ECJ on the grounds *inter alia*, that the Commission had acted as both prosecutor and decision maker. The ECJ found that the Commission was not a "tribunal" in the context of Article 6 of the ECHR[91] and that there were sufficient safeguards for due process in the relevant enforcement regulation 17/62.[92] The fine was eventually reduced but on different grounds unconnected with this issue. The German authorities then issued a writ against the applicants, Melchers, seeking to execute the judgement of the ECJ. Melchers mounted a challenge against the Federal Minister of Justice claiming that the writ had been wrongly issued as the ECJ and had violated his fundamental rights as guaranteed under both Article 6 of the ECHR and Article 103(1) of the Grundgesetz. The Federal Constitutional Court threw the application out on the grounds that the fundamental rights guarantees referred to were already part of the jurisprudence of the ECJ and that therefore no separate examination of protection of rights would be undertaken before issuance of the writ of execution.

Melchers then brought an application against Germany to the European Commission of Human Rights, but this was declared inadmissible. In keeping with *CFDT* the Commission declared the case inadmissible *rationae personae* as the ECJ was not a party to the ECHR and therefore its decisions could not be reviewed. It was also inadmissible *rationae materiae* since the contracting state had transferred its powers to a competent organ that respects human rights. Each writ did not therefore have to be examined for compliance with Article 6 of the ECHR. Interestingly, although the European Human Rights Commission held that it could not review acts of the EC directly, it was nevertheless of the view that the contracting party remained ultimately responsible for acts in violation of the ECHR, and that this was regardless of whether or not the breach was a consequence of domestic law or of regulations entered into in compliance with international obligations.

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91 See *Musique Diffusion Française v. Commission* [1983] ECR 1825.

92 This is so although the Court does not refer to the rather extensive case-law developed by the Strasbourg Court in this respect.

Furthermore:

> "The Commission considers that a transfer of powers does not necessarily exclude a State's responsibility under the Convention with regard to the exercise of the transferred powers. Otherwise the guarantees of the Convention could want only be limited or excluded and thus be deprived of their pre-emptory character.... Therefore the transfer of powers to an international organisation is not incompatible with the Convention provided that within that organisation fundamental rights will receive an equivalent protection".

The Commission also stated that it was satisfied that the,

> "...legal system of the European Communities not only secures fundamental rights but also provides for control of their observance. It is true that the constituent treaties of the European Communities do not contain a catalogue of such rights. However, the Parliament, the Council and the Commission of the European Communities have stressed in a joint declaration of 5 April 1977 that they attach prime importance to the protection of fundamental rights, as derived in particular from the constitutions of Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms... In addition the Court of Justice... has developed a case-law according to which it is called upon to control Community acts on the basis of fundamental rights..."

The Commission is cautioning Member States that where they are *not* satisfied that there are these fundamental rights guarantees they reserve the right, notwithstanding *CFDT*, to review a contracting party's actions in pursuance of international obligations for incompatibility with the higher norms of human rights. The jurisdiction of Strasbourg is re-inforced. Where the faith they have placed in the ECJ appears ill-founded, they indicate in *Melchers* that they will act. Perhaps they should already have done so.

It is clear, for example, that in the field of competition law of the EC, the actions of the authorities may be vulnerable on human rights grounds, at least as these have been developed in the ECHR. Even where the ECJ does recognise human rights, it may not do so in line with the Strasbourg jurispru-

dence. Under regulation 17/62 the Commission has quite wide enforcement powers for the investigation of alleged breaches of the competition rules. These include the right to enter premises and to take documentation. In the *Hoechst*[93] case there was a challenge to the Commission's powers which alleged, *inter alia*, a violation of Article 8 of the ECHR concerning the right to privacy. The ECJ held that the protection of business premises was not covered by Article 8. However, only a few months earlier the Strasbourg Court had indicated the possibility that business premises were covered by Article 8 in the *Chappell*[94] case. If there had been affiliation or at least closer co-operation between the Strasbourg and Luxembourg Courts this would not have happened.

7.4 The Conflict continues

Another illustration of the difficulties between the Strasbourg Court and the ECJ comes from the recent *Grogan*[95] case. The defendant, a students' organisation, published in student guides the names and addresses of clinics in the UK offering termination of pregnancy services. Judging this an infringement of the Republic's constitution, the Irish Supreme Court granted an injunction to restrain the activity. However, it referred the matter to the ECJ in view of the defendants' claim that this national prohibition amounted to a restriction on the freedom to supply services as guaranteed by the Treaty of Rome.[96] The students also alleged an infringement of Article 10 of the ECHR, which protects freedom of expression. The ECJ was asked whether the organised activity of terminating a pregnancy was a "service" within the meaning of the Treaty of Rome and secondly, whether in the absence of harmonised rules a Member State could prohibit distribution of information about services lawfully available in another Member State and furthermore, whether there was a right, in EC law, to distribute information about services lawfully available under conditions in one Member State, to residents of another Member State where such services were prohibited under its constitution. (The Irish Court

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93 See above 34 note.

94 *Chappell v. UK*, judgement of 30 March 1989, Eur Court HR, Series A, N°. 152.

95 Judgement of the High Court [1990] 1 CMLR 689; Irish Supreme Court decision at [1990] 1 CMLR 689; judgement of the ECJ at [1991] 3 CMLR 689; judgement of Morris J. [199] 1 CMLR 197.

96 See Article 59.

did not ask whether the constitutional rule protecting the unborn by a ban on abortion was itself incompatible with EC law).

Advocate General Van Gerven in his opinion[97] (which was of course not binding on the Court), considered that this organised activity of termination of pregnancies was a service. The Advocate General also considered that there might be an impediment to cross-border services and he therefore assessed whether the restriction could be justified in the light of Article 10(2) of the ECHR. He pointed out that the Strasbourg Court had not yet had the opportunity to consider the compatibility of rules on abortion with the ECHR so in fact the issue was perhaps reaching the wrong forum first. As far as EC law was concerned the Court's task involved,

> "...balancing two fundamental rights, on the one hand the right to life as defined and declared to be applicable to unborn life by a Member State, and on the other freedom of expression, which is one of the general principles of Community law on the basis of the constitutional traditions of the Member States and the European treaties and international treaties and declarations on fundamental rights, in particular Article 10 [of the ECHR]".

In terms of the potential restrictions to freedom of expression the Advocate General applied the principle of proportionality and considered that, "the individual States must be allowed a fairly considerable margin of discretion". The Advocate General's findings therefore left open the potential that a woman who was restricted from travelling to obtain an abortion might argue that it contravened general principles of EC law.

The ECJ did not however concur with all of the Advocate General's findings.[98] The ECJ found that abortion was indeed a medical service within the meaning of Article 60 of the Treaty of Rome. No exceptions were to be made for the special nature of abortion - it was simply a service. The Court then

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97 Opinion of the Advocate General of 11 June 1991.

98 For further discussion of the *Grogan* case and the issues raised by it see C. Gearty, The Politics of Abortion, 19 Journal of Law and Society [1992] 441-454; E. Spalin, Abortion, Speech and the European Community [1992] Journal of Welfare and Family Law 17-32; D. Rossa Phelan, Right to Life of the Unborn v. Promotion of Trade in Services: The European Court of Justice and the Normative Shaping of the European Union, [1992] Modern Law Review 670-689.

decided that the restriction on the provision of information was not an interference with the freedom to provide services because there was no economic interest on the part of the defendant in that the link between the clinics in the UK and the students' unions was too tenuous. The ECJ having found no restriction on the freedom to provide services, did not then address the question of fundamental rights at all holding that they had no jurisdiction "with regard to national legislation lying outside the scope of Community law".

This is a remarkable judgement in so far as it takes a purely economic approach to a question of fundamental rights and is the example *par excellence* of the fact that the ECJ does not value human rights as part of individual liberties above other purely economic rights pursuant to the completion of the single market. It avoids the very difficult questions on the *jus cogens* norm of the right to life by considering EC law in isolation as only the law applicable to an economic arrangement between states. It is the language of supremacy of EC law not of human rights. Even if this is not about the right to life but rather about freedom of expression, then one should consider whether the ECJ was correct in distinguishing between speech motivated by economic and non-economic interests.[99]

8. Solutions to the Human Rights Dilemma - Alternatives to Accession to the ECHR

The solution eventually adopted by the EC to fill the gap in human rights protection depends on the criteria that are applied. There are several (sometimes competing) criteria which may be applied. If the concern is with the supremacy of EC law and the completion of a single market, then the solution may be different than if the main focus is the protection of the individual, as an individual, rather than as a factor in the productive process. It is clear from the analysis of the ECJ case-law above that the concern from the Court's viewpoint is primarily for the fulfilment of the goal of a single market and if this can be done through the language of rights such language is deployed to achieve this end. The ECJ is not putting protection of the individual first.

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99 The case has since been heard by the Strasbourg court which decided by 15 votes to 8 against Ireland - see *Open Door Counselling and Dublin Well Woman Centre v. Ireland* judgement of 29 October 1992.

There is a spectrum of alternatives available. Concern for the proper functioning of a single market in which EC law reigns, dictates a minimalist stance in terms of the ECHR in which there would be no scrutiny of EC acts by the Strasbourg machinery. Human rights would then be safeguarded solely by the ECJ and there would be none of the institutional, political and jurisprudential difficulties already identified. At best this stance would mean maintenance of the status quo with indirect review of EC acts by the ECJ with reference to the ECHR, UN human rights instruments and general principles of law such as proportionality, legal certainty and equality.

At the other end of the spectrum lies the possibility of embracing the ECHR fully and of making EC acts directly reviewable by the Strasbourg organs. This would necessarily involve the ECJ relinquishing competence in the area of fundamental rights of individuals and affiliating to the ECHR.

In between these two options there are a range of possible alternatives some of which we explore in greater detail below. There is the potential for shared jurisdiction between the Strasbourg and Luxembourg Courts on the basis of the first EEA model that was proposed.[100] There is the possibility of informal consultation and information sharing by the two Courts. The ECJ could even attempt to make its practice more consistent with that of the Strasbourg Court without itself being directly reviewed by Strasbourg.[101] More ambitiously, the EC could adhere to the proposed catalogue of rights in the European Parliament's Declaration[102] or even create a new and binding EC-specific code. Alternatively, the EC could decide to concentrate only on certain rights that appear more relevant than others to the immediate activities of the EC, such as social rights.

The route that is chosen is a function both of the criteria that are applied and the view that is taken as to the role of law in civil liberties protection. A so-called "hard" law option, indicates the need for adherence to the ECHR. This would entail being bound by an established set of rights with an appropriate

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100 See above p. 14.

101 This could be done either through some co-operation procedure or by means of Article 177 type references.

102 See above p. 4.

enforcement machinery for ensuring sanctions in the event of non-compliance with the terms of the Convention. The "soft" law option suggests in contrast that law need not be in a legally binding form to be effective. Law is then seen as a process of achieving the protection of rights through the pro-active work of the ECJ and the perception within the EC of the need to protect individuals. Given the current concern of the ECJ with the goals of supremacy and the completion of the single market, it is unlikely that that Court could be trusted with the task of securing individual rights outside that very particular context.

8.1 An EC Code on Human Rights

Others argue that if the EC wish to have a code of "civil liberties" in the context of present EC activity, then such a code should not be akin to the 1989 Declaration of the European Parliament, but rather should contain provisions on the following:

(a) privacy and data protection;
(b) insurance law;
(c) access to employment and education;
(d) protection of property rights of non-nationals;
(e) policing and extradition arrangements;
(f) effect of harmonisation on the differing legal status of minorities;
(g) impact of new technologies on human rights, e.g. biotechnology, environmental protection.[103]

The Declaration only deals with privacy, data protection and access to employment and education from this list. The rights covered here accurately reflect traditional EC activity, but do not really reflect an understanding of the expanding competences of the EC and European Union with the corresponding need to provide adequate protection from a civil liberties rather than an economic viewpoint.

On the whole Member States do not appear to be impressed with the Declaration. Another suggestion has been that any catalogue of rights created specially for the EC should attempt to be consistent with other models within

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103 See note above, p. 8.

Europe, and should therefore have the rights contained in the ECHR but perhaps not those in the additional protocols that have not been ratified by all Member States. A second criterion would be that the EC should aspire to a higher standard than the ECHR. It could therefore take on the "third generation" rights such as the right to a clean and safe environment, food, development and education. Thirdly, the catalogue should be framed in a manner which does not restrict the development of further rights through other sources of EC law such as general principles or citizens' rights.

It would seem fair to say that in its current form the Declaration is not a serious alternative to accession from the point of view of civil liberties protection. Yet in the absence of accession it remains a powerful symbol reflecting the need for democratisation of the EC.

8.2 Accession to the European Social Charter

In his evidence to the House of Lords Select Committee, Professor Bob Hepple suggested another alternative to affiliation to the ECHR.[104] He drew attention to what he considers were the advantages of accession to the Council of Europe's European Social Charter (ESC). This document concentrates on social rights and raises interesting questions as to the relationship of the ESC with the EC's own Social Charter.[105]

Affiliation would be on the basis of the Single European Act, the Social Charter of 1989 and the Maastricht Treaty's Social Protocol which aims to continue and extend the work of the Social Charter.[106] Indeed, the EC's Social Charter states that it draws inspiration from the Conventions of the International Labour Organisation and from the European Social Charter of the Council of Europe. Even the ECJ has cited the ESC as a source of the general principles of EC law.[107]

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104 See B. Hepple, European Social Dialogue - Alibi or Opportunity, Institute of Employment Rights [1993].

105 Community Charter of the Fundamental Social Rights of Workers, Social Europe 1/90, p. 46-50.

106 Maastricht Protocol on Social Policy and the Agreement on Social Policy Concluded Between the Member States of the European Community with the Exception of the United Kingdom of Great Britain and Northern Ireland, in Foster, Blackstone's EEC Legislation (3rd ed.) p. 393-396.

107 See *Blaizot v. Belgian State* (24/86) [1988] ECR 379.

The ESC is also closer to the goals of the EC as reflected in the Parliament's 1989 Declaration. It contains, for example, rights pertinent to the free movement of labour such as the right to organise, to bargain collectively and other rights aimed at the protection of the family.

Apart from its general appropriateness, the ESC would be less complex to apply than the ECHR since it lacks the ties of enforcement of the Convention. There is no right of individual petition. It is also not within the jurisdiction of the European Court of Human Rights or the Commission on Human Rights. The ESC works on the basis of a system of bi-annual national reports to a Committee of Independent Experts who examine the reports and make recommendations. These recommendations are transmitted to the Governmental Committee and the Parliamentary Committee of the Council of Europe which also make comments. These are all fed through to the Council of Ministers which has the power on the basis of the report, to issue binding recommendations to the Contracting Parties.

One could argue, however, that given that the EC has its own Social Charter (albeit a non-binding, "solemn declaration"), affiliation to the ESC would be a duplication of protection. There are, however, some important differences remaining. The ESC offers protection to *everyone* within the territory of the Contracting State while the Social Charter is expressly for the benefit of those who qualify as a "worker" within the meaning of the case-law of the ECJ.[108] The Social Charter has also not proved an unqualified success in that it was agreed by only eleven Member States (the UK not being included) and was specifically formulated as a non-binding declaration. No EC legislation in the field of social policy has therefore yet been based on the Social Charter and it is doubtful whether it can ever be the basis of social policy legislation for the EC either from a practical or a legal viewpoint. The ESC also offers greater protection in the scope of substantive rights protected in terms of greater health protection, social and medical assistance and protection of the rights of migrant workers.

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108 For the meaning of a worker in the EC context see *Levin* (53/81) [1982] ECR 1035; *Lawrie-Blum v. Land Baden-Württemberg* [1986] ECR 2121; *Steyman* [1988] ECR 6159; *Battray* [989] ECR 1621.

It would be easy to accommodate the ESC within the Maastricht process since the Social Protocol does not prejudice the accession by the Union to any other international instruments. Perhaps affiliation to the ESC should be seen not in the context of an alternative to the ECHR but rather as something that ought to be considered in any event in order to provide improved protection for labour in the EC.

9. Concluding Remarks

The ever widening gap in the protection of human rights in the EC is to some extent attributable to the tension between rights as grounded in notions of individual liberties and the free trade model. It appears that the ECJ is concerned only with the latter model and may not therefore be either the appropriate or the most successful forum for the protection of human rights.

The ECJ has consistently used the language of rights to pre-empt national autonomy and extend EC power into areas traditionally the preserve of the nation state. Human rights are invoked to scrutinise national measures but where rights might have been utilised to challenge the integrity of EC measures the ECJ has been less active.

Given the current situation and the mandate of the Maastricht Treaty, it is worth contemplating the implications of a more activist stance on the part of the EC. This raises the question of the implications of an unambiguous human rights approach on the ECJ's power to act. A more rights-oriented approach on the part of the ECJ would not necessarily eliminate its overriding free market concerns. The question then becomes whether the balance of advantage lies with EC accession to the ECHR or with some other action. While the Strasbourg organs of the ECHR certainly have a greater claim to understanding of rights based on a model of individual liberties, it does not boast of a perfect tribunal that always achieves the right result.

Yet what is the "right" or most appropriate result when applying human rights standards to the EC? The judicial enforcement of rights by multinational enterprises might actually be destructive of appropriate state and EC action. A most striking example is the area of competition. Should notions of human rights be applied to make what is already a difficult task well nigh impossible? Corporate entities could invoke the language of rights to

circumvent the competition rules and thereby reinforce the uneven playing field that Articles 85 and 86 of the Treaty of Rome attempt to eliminate. It is perhaps not useful for the EC to adopt rights language when defending the competition rules against powerful business interests. There may certainly be room for considering the application of the human rights model to improving the Commission's enforcement procedure[109] but beyond that the net benefit is doubtful.

It is clear that the EC will continue to be vulnerable to the ECHR in areas such as competition and agriculture. Such scrutiny may yield benefits in terms of greater transparency and accountability of the EC institutions but cannot be seen as a guarantee of the application of the human rights model since even the jurisprudence of a human rights tribunal cannot always be uncritically accepted. Until the EC makes a clear decision as to its form and role in Europe it will continue to be vulnerable to human rights scrutiny and yet unable to forge a clear understanding of the application of rights in this legal order.

109 See Regulation 17/62 OJ (1959-62), 87.